

# The Curious Case of Article 299 of the Turkish Penal Code: Insulting the Turkish President

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The fresh joke among Turkish legal circles nowadays goes something like this: “Has a crime been committed and do you worry that law enforcement may not respond immediately to the situation? Just call'em and say the person has insulted the Turkish President; they'll be there in no time!” Like most legal jokes, this one too gives away a grim picture, specifically, the current state of freedom of expression in Turkey, and specifically the chilling effect created by Article 299 of the Turkish Penal Code, that is, the provision on insulting the President.

## Setting out the crime and European jurisprudence

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The provision translates as:

“Article 299-(1) The person who insults the President shall be punished by imprisonment from 1 year to 4 years.

(2) If the crime is committed publicly, the punishment will be increased by 1/6.

(3) For this crime to be prosecuted, the permission of the Justice Ministry shall be necessary.”

What is striking at first glance is that the crime of insulting an ordinary person is punishable by imprisonment from 3 months to 2 years according to Article 125 of the Penal Code, whereas if the same crime is committed against the President the imprisonment is from 1 year to 4 years. This appears to be unconstitutional *prima facie*: Article 90 of the Turkish Constitution explicitly states that international treaties to which Turkey is a party have the force of law. What is more, according to the same Article 90 of the Constitution, in the event of conflict between treaties relating to fundamental rights & freedoms and ordinary Turkish laws, the former prevail over the latter. Thus it is clear that the European Convention on Human Rights (ECHR) prevails over Turkish law, in the event of conflict. The fact that the Turkish Penal Code provides for more protection for state officials, namely the Turkish President, than it does to ordinary citizens, against the crime of insulting is plainly contradictory to the ECHR as interpreted by the European Court of Human Rights (ECtHR).

The ECtHR in *Colombani et. al. v. France*, in finding that a law affording special protection to foreign heads of state breached Article 10 of the Convention on the freedom of expression noted: “It is the special protection afforded foreign heads of State by section 36 that undermines freedom of expression, not their right to use the standard procedure available to everyone to complain if their honour or reputation has been attacked or they are subjected to insulting remarks” (para 69). What is important about this decision is that special protections afforded to heads of state violate the Convention, but providing heads of state with legal safeguards against insulting remarks *per se* does not. Article 299, however, clearly does the former, and is thus violative of the ECHR, and as a corollary to this, violative of the Turkish Constitution. Thus, some Turkish scholars went so far as to argue that Article 299 has been implicitly abrogated by virtue of Article 90 of the Constitution, an argument, which, while theoretically quite appealing, is not the case from a legal reality standpoint.

The ECtHR, in another case titled *Pakdemirli v. Turkey*, yet again found a violation of Article 10 of the Convention. In that case, Suleyman Demirel, a former Turkish President, had sued a Turkish academic for defamation claims under the Turkish Code of Obligations. The Turkish academic had called President Demirel, among other things, a liar and a slanderer. The Turkish courts ordered the academic to pay an unprecedented fine of approximately 55,000 Euros at the time. All appeals failed and finally the case reached the ECtHR. The ECtHR disagreed with the Turkish courts and stated that while the fining was prescribed by law and had pursued a legitimate aim, it was nevertheless not necessary in a democratic society, given the disproportionate amount of the fine. The Court noted that the Turkish civil courts, in direct contravention to established ECtHR case law, treated the case with special importance because the claimant was a head of state, and thus accorded the claimant extra privileges—unequivocally violative of the ECHR as ruled in *Colombani*.

A final ECtHR case to be noted is Otegi Mondragon v. Spain. This case was about a separatist politician's comments at a press conference, during which he called the King "he who protects torture and imposes his monarchical regime on our people through torture and violence." He was subsequently subjected to one year of imprisonment. The ECtHR found an Article 10 violation and ruled that Mondragon's remarks were provocative but in relation to the King's institutional role, and not against the personal dignity or honor of the King. The Court noted that shielding the King from such legitimate criticism would be tantamount to affording him overprotection by law, which would be in direct contravention to ECtHR case law. The Court finally noted that the punishment was disproportionate, since imprisonment in the realm of political speech could only be reserved to extreme cases such as hate speech or incitement to violence.

ECtHR judgments are binding on Turkey and furthermore are the primary source for interpreting the ECHR, a treaty to which Turkey is party and which, according to Article 90 of the Turkish Constitution, prevails over national laws (such as Article 299 of the Turkish Penal Code on insulting the President), in the event of conflict. ECtHR jurisprudence clearly indicates such a conflict between Article 299 and the Convention, but are Turkish courts aware of this?

## European Court of Human Rights vs. Turkish courts

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Quite recently, some Turkish college students were detained during a protest at their graduation ceremony. They held a placard depicting President Erdogan as various animals. What is more, the depictions on the placard were inspired by a series of cartoons published by the Turkish satire magazine *Penguen* (literally "penguin") in 2006, and back then, the cartoonists, who were charged with the crime of insulting then-Prime Minister Erdogan, were acquitted. This, in and of itself, is proof to the shift that has taken place in the judiciary in terms of its stance toward freedom of expression and political speech. The interesting dimension of this recent controversy is that the head of the main opposition party, the Republican People's Party (tr. *Cumhuriyet Halk Partisi*, CHP), Kemal Kilicdaroglu tweeted shortly after the detainment of the students, stating: "You will have to tolerate criticism and satire, you must! You cannot stop criticism and satire by detaining [people]." The tweet also included a picture, again depicting the President as various animals, as did the placard carried by the college students. 72 other MPs from the main opposition party have either retweeted Mr. Kilicdaroglu's tweet or have tweeted similar tweets with the same depictions. The prosecutor's office in Ankara, the capital city, started an investigation about Mr. Kilicdaroglu's tweet *ex officio*. Shortly after, President Erdogan filed a complaint against both Mr. Kilicdaroglu and the 72 MPs.

The Turkish courts generally disregard or are oblivious to ECtHR jurisprudence on the matter. Tragically, recently, a Turkish doctor was prosecuted for insulting the Turkish President for having tweeted images comparing President Erdogan to the fictional character in *The Lord of the Rings* trilogy, Gollum. Peter Jackson, the producer of the films, comically remarked that the character to which the President was compared was not Gollum, but rather Smeagol, the "good" aspect of Gollum's personality. Jackson stated: "Smeagol is a joyful, sweet character. Smeagol does not lie, deceive or attempt to manipulate others. He is not evil, conniving or malicious – these personality traits belong to

Gollum, who should never be confused with Smeagol.” While eventually the doctor was acquitted of all charges, what made this case quite remarkable and gave it worldwide notoriety was the presiding judge’s order that a committee of experts should watch the series and assess Gollum’s personality to decide whether the Turkish President had indeed been insulted or not. The expert opinion emphasized that Gollum was, let alone an evil character, a “persecuted” figure in the trilogy and therefore no insult was made against the President.

Yet, not all cases end in a, even if tragicomic, happy way. Perhaps most notoriously, a 13-year old was prosecuted and sentenced to 1 year and 9 months of imprisonment over a Facebook post allegedly insulting the President (the execution of the verdict was deferred, provided that the same crime was not committed in the future for a prescribed term). Even worse, the verdict was reached despite President Erdogan’s withdrawal of his complaint.

According to a report that came out in 2015, prepared by the Turkish Bar Association, during the former President Abdullah Gul’s term in office, despite prosecutorial investigations, not a single person was detained over charges of insulting the president. However, during Erdogan’s presidency, until as early as 2015, at least 18 people were detained over the same charges.

While the picture is nowhere near rosy, there are Turkish courts that align themselves with ECtHR jurisprudence, which, as stated above, is a mandate of the Turkish Constitution. In one case, two college students who wore t-shirts that had President Erdogan’s picture on them and read “Dictators are overthrown on the streets!” were prosecuted under Article 299. In acquitting both students, a Turkish judge ruled: “[It is understood that] students who are in their twenties wish to indicate their political opposition to and discontent with a politician who has been impactful on the country’s past 15 years...that they make their intent visible through the use of the word ‘dictator;’... that the words of the defendants are nothing more than political criticism that is open to debate...”

## The politics behind free speech and the Turkish Constitutional Court

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In the United States, Democrats and more generally liberals are discontent with the ever-expanding nature of the 1st amendment. However, it was the generous reading of the 1st amendment in the early 1900s that paved the way for liberal Supreme Court opinions ruling, for example, that it was unconstitutional for school administrators to force students to salute the flag (Barnette – 1943) and that it was constitutionally permissible for a conscientious objector to wear a jacket displaying the phrase “Fuck the Draft” (Cohen v. California – 1971). More recently, in the late 1980s, it was again the generous reading of the 1st amendment that produced Texas v. Johnson (1989), which famously ruled that a Texas statute criminalizing the desecration of the American flag was unconstitutional. Yet, today’s liberals are mostly discontent with the overgrowth of 1st amendment doctrine which gave them all those liberal rulings in the first place. Liberals are especially discontent with 1st amendment jurisprudence as it relates to corporate entities’ rights to free speech and campaign contribution and religious people’s right not to serve gay couples, just to name a

few. Today, speaking broadly, liberals argue for a narrower reading of the 1st amendment, while it is mostly the conservatives who benefit from an expansive reading of the same amendment.

In Turkey though, the liberals are struggling for an expansive reading of the Turkish Constitution's provisions relating to freedom of expression—the roles are reversed when compared to that of the liberals in the United States.

In what has been regarded as a disappointing judgment by some Turkish scholars, in December 2016, only some months after the failed coup attempt, the Turkish Constitutional Court upheld the constitutionality of Article 299. The Court, in relevant part, ruled that the President represents the Turkish nation and its unity according to the Constitution, and therefore an insult against him/her would be more than a personal insult, and thus it is understandable that the lawmaker has afforded special protection to the President. The Court also stated that Article 299 passed constitutional muster from a proportionality analysis standpoint: in the Court's opinion the law had the legitimate aim of protecting the President as head of the state; the punishment prescribed was necessary and proportional to the legal interest protected. Conspicuously, nowhere in the decision did the Court make reference to ECtHR jurisprudence, perhaps cognizant of the fact that it would be difficult to reconcile ECtHR case law with its own rationale.

It could be speculated that the Court's unanimous ruling, rejecting the constitutional challenge against Article 299, is part of a broader trend that some academics have observed with regards to the Turkish Constitutional Court following the failed coup attempt: an unwillingness to appear as hostile towards the executive branch. The Court's repudiation of its prior jurisprudence on reviewing the constitutionality of emergency decrees, for example, can be cited as another aspect of this overall trend of judicial self-restraint. Commenting on this post-coup attitude of the Constitutional Court, Professor Ergun Ozbudun, one of the most respected constitutional lawyers in Turkey, has written the following in the recent edition of his well-known treatise *Turkish Constitutional Law* (Yetkin Publishing, 2017, p. 436), with which one cannot help but agree:

“...It can be observed that, following the failed coup attempt of 15th of July, the Constitutional Court has espoused a ‘judicial self-restraint’ attitude. If judicial activism which manifests itself in the form of interfering with the legitimate discretionary powers of elected organs is open to criticism, the Constitutional Court's self-imposition of excessive judicial restraint, as the ultimate safeguard of individual rights and freedoms, is equally alarming.”

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